APPENDIX A

Opinion of the Court of Appeals (January 23, 1961)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment of the District Court, sitting without a jury, permitting recovery of an amount measured by payments denominated "variable participating royalties" on the finding that such payments were in reality a bonus paid as consideration for the making of an oil and gas lease.

The facts essential to a decision of this case can be rather briefly stated, although they must be culled from a long and involved record and from nearly 600 pages of briefs.

In 1943, Fox Realty Company was a wholly owned subsidiary of the defendant, Twentieth Century. It was the owner of two tracts of land in Los Angeles County, California, which had been acquired, and had long been used, as a site for motion picture studios. It was also the owner of all minerals thereunder subject to restrictions in favor of its predecessors in title prohibiting the drilling for oil and gas. In April 1943, Fox Realty acquired a third tract in fee simple without restriction as to drilling, and without reservation of any interest in the minerals. The prior owner of the two tracts and the owner of the third tract were interrelated and were the predecessors in title to plaintiffs here. As a group, they will hereafter be called plaintiffs.

In the acquisition of the third tract Fox or Twentieth Century paid $491,419.50 for the 89.349 acres involved

and it and defendant Twentieth Century jointly and severally contracted with plaintiffs to pay the former owners of the two lots and to pay the owner of the third lot then being acquired with respect to each lot:[1]

> "* * * an amount equivalent to eight and one-third per cent (8⅓%) of the proceeds of all oil, gas, other hydrocarbons and other associated substances produced and saved from wells bottomed under [Lots 1, 2 and 3] without deducting for charges of any kind whatsoever, and * * * an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease for the extraction of oil, gas, other hydrocarbons and other associated substances from wells bottomed under said [Lots 1, 2 and 3] * * *."

Thereafter, in 1952 Fox entered into an oil and gas lease as lessor with Universal Consolidated Oil Company. That lease provided for the payment by Universal directly to Plaintiffs of the 8⅓% amount on all three lots. In addition, Fox received for itself a royalty of 11⅔% (together with the 8⅓% to be paid directly to plaintiffs this would, of course, amount to payment by Universal of a

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[1]The contract, without indicating the inter-company arrangements leading to it was between plaintiffs on the one hand and Twentieth Century and Fox on the other. It provided that the third lot and the releases on the other lot were to be conveyed to Fox in return for a promise, jointly and severally made, by Twentieth and Fox to pay the $491,419.50 and the 8⅓% and other items quoted in the text.

20% basic royalty) and it also received what was denominated a "variable participating royalty", consisting of one-half of Universal's net profits from the lease, as defined therein.

We defer consideration of questions of jurisdiction, including that relating to the parties, because the jurisdiction issue will be better understood after we analyze the nature of the contracts. The principal consideration on the merits presented by the suit is whether the full 20% royalties and the "variable participating royalties" were either bonus payments or land rentals. If so, the plaintiffs were entitled to one-half of these sums rather than an amount equal to only 8⅓% of production, which is all that they have received since the execution of the lease.

The respective contentions can be stated quite simply: Plaintiffs contend that the contract guaranteed them 8⅓% basic royalty if there was any oil or gas production and that in addition if Fox obtained anything more than 16⅔% royalties, all such excess represented either bonus or land rentals and they became entitled to one-half of them as well; in the alternative, they claimed that they were entitled to all the excess that would not fit into the recognized definition of royalty, in which case they were entitled to receive one-half of the "variable participating royalties", or net profits, if not also one-half of the 3⅓% of excess royalties.

The defendant contends that all the plaintiffs were entitled to receive beyond the 8⅓% was any payments that fit into the definition of either "bonus" or "land rental" and that the California jurisprudence excluded net profits and the 3⅓% excess royalties from either definition, and thus, plaintiffs were entitled to nothing more than the 8⅓% which they had been receiving.

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The plaintiffs made a third contention which, in effect, is that in surrendering the restrictions on drilling as to the two lots and in conveying the fee simple without restrictions to the third in return for the 1943 agreements, there was imposed on Fox, and vicariously, on Twentieth Century, the quasi-fiduciary duty to make the best lease agreement it could for the joint protection of itself and of plaintiffs. This, plaintiffs say, required them to obtain as good a "bonus" as possible; it precluded the making of a lease that so divided the total fruits of the leasing as to give much greater benefits to Fox by simply avoiding the inclusion of anything called "bonus" but by including something equally valuable in the nature of added royalties or contingent income in a form of a participation in net operating income. The language of the contract so clearly distinguishes royalty from any other kind of benefits to be realized from a lease of the minerals, we conclude that it is clear that there could be no violation of the defendant's alleged duty to act in good faith if it was able, as happened here, to exact an additional amount clearly recognized to be royalties. The disposition we make of the case as to the remaining payments makes it unnecessary for us to determine whether the fiduciary or good faith contention should prevail as to the variable participating royalties.

Restating the issue, we must decide whether the excess of 3⅓% (20% over twice 8⅓%) and the one-half of the net profits of the operation are "bonus payments" or "land rentals," "distinguished from the term 'royalty' as the term 'royalties' is generally understood in connection with the construction thereof in oil and gas leases."

The trial court, after making extensive findings of fact, concluded that both categories of payments satisfied the

definition of "bonus" and decreed that the plaintiffs were entitled to participate fifty-fifty with defendant as to all payments from the Universal Consolidated Lease.

We consider the simple part of the question first. There can really be no serious doubt that the entire 11⅔% royalties received by Fox (in addition to the 8⅓% paid by lessee to plaintiffs direct) was "payment of oil and gas royalties as the term 'royalties' is generally understood and defined, etc.", except for one implausible and strained contention. That is, that at the time in question in California the customary *rate* of royalty was 16⅔%; therefore, the term "royalties, generally understood and defined in connection with the construction thereof in oil and gas leases" must mean that anything in excess of 16⅔% is excluded. To the contrary, we think the parenthetical part of the contract intends only to define the *quality* of a royalty and not the *quantity*. We think it clear as to royalties, in the accepted sense, the plaintiffs agreed to a figure of 8⅓%. Anything defendant was able to bargain for as royalties beyond that figure it was not obligated to share with plaintiffs. To this extent, therefore, the judgment of the trial court was in error.

Turning then to the second and more difficult issue: was the one-half of the net profits from the operation a bonus as distinguished from the payment of royalties? We conclude that on this issue the plaintiffs are correct in their contention, and to that very substantial extent we affirm what was decided by the trial court.

Much of the argument in the extensive briefs filed by the parties is devoted to the discussion of the degree to which it was proper for the trial court to hear evidence of the circumstances surrounding the execution of the 1943

contract and concerning the meaning in the trade of the several terms "bonus", "land rentals", and "royalty". Most courts, and this one is no exception, have had considerable difficulty in formulating any definitive rule that adequately covers that area of the law of evidence. The members of this Court are not, among themselves, always in agreement in the particular application of the generally accepted rules. See *Fidelity Fire Insurance Company* v. *Farm-Air Service*, 5 Cir. 255 F. 2d 658; *Gulf Atlantic Towing Corp.* v. *Dickerson*, 5 Cir. 271, F. 2d 542; and see discussion in footnote 14 of *U. S. Industries* v. *Camco, Inc.*, 5 Cir. 277, F. 2d 292, 295.

Whatever may be the proper rule respecting the introduction of external evidence to aid the court in construing a written contract, we do not need to concern ourselves with that problem here, because we think it plain that this contract, by its very terms, required reference to such external evidence. The only "bonus" or "land rentals" payments in which the plaintiffs are entitled to participate are such as are distinguished from royalties, and the parties agreed that in ascertaining what was meant by royalties they would ascertain what is understood and defined as royalties in the construction of such terms in oil and gas leases. When it became the duty of the trial court to make this ascertainment, it was required, we think, to obtain evidence from those familiar with the terms as used in the trade.

Appellant contends that rather than importing the use of external evidence, this language required the trial court to refer to California decided cases,[2] which it says define

[2]It is not disputed that California law governs in the construction of the contract.

"bonus", "land rentals", and "royalty" in legal terms that preclude a decision in favor of the appellants.

The appellees take the position, on the contrary, that this parenthetical clause of the contract does not refer the inquiry to decided cases, but rather to the understanding of the trade, and moreover they say that if the matter be referable to judicial decisions alone, there are no California decisions holding that the two categories of payments here are neither bonus or land rentals.

As we have already indicated, we conclude that there is no question here of varying the contract by parole evidence, because the contract itself makes the definition of the term "royalty" referable to understanding in the trade, and this is, of course, provable only by parole evidence.

While we conclude that this matter of definition is to be ascertained as a question of fact, based upon the understanding and definition of "royalty" in the construction of oil and gas leases in California, we feel it appropriate to discuss briefly the argument by appellant touching on the California jurisprudence dealing with the various definitions. The principal case cited by appellant in support of its contention is *Geller* v. *Smith*, 30 Calif. App. 485, 20 Pac. 2d 102, a case decided in 1933. The trial court in that case was concerned with a suit by a real estate agent under a contract which entitled the agent to any "bonus" received by his principal in executing a lease. The parties to the lease denominated part of a $2,000 cash payment, a "bonus" and $1,500 a "commission." The trial court held that the $1,500 was a bonus notwithstanding the parties called it a "commission." In doing so, the court said:

> "Apparently it all hinges on the meaning of the word, 'bonus'. I think the word 'bonus' has a legal

> meaning, but a certain term may have a significant meaning in a certain business and in a certain locality, and if it varies with the locality, it may be established by evidence. On the other hand, that expression may come to have a definite legal meaning. *My opinion is that the term 'bonus' as applied to an oil lease has come to have a definite meaning, to wit: a sum of money paid by the lessee to the lessor in consideration for the execution of a lease, as distinguished from the return or royalty reserved by the lessor to be paid by the lessee through the term of the lease."* (This emphasis is used by appellant to indicate what it particularly relies on.)

This statement was approved by the appellate court in affirming the judgment of the trial court.

It at once becomes apparent that in order to decide that the $1,500 involved in that case was a "bonus," as contracted for by the parties, it was not necessary for the court to announce a definition of "bonus" *as distinguished* from "royalty." There was no suggestion in that case that the $1,500 payment was a "royalty."

Thus, it must be recognized, that in approving this statement, the California Court of Appeals approved what was really dictum. In light of this analysis of *Geller* v. *Smith, supra,* we think the later opinion by the California Court of Appeals in *Stockton* v. *Weekes,* 51 Cal. App., 2d 447, 125 P. 2d 110, decided in 1941, is significant. In that case, the court said, "No fixed and unvarying meaning can be applied to the term 'bonus' without a construction of the particular lease in each case."

This apparently was the latest pronouncement of the California Appellate Court touching on the subject at the time the 1943 contract was executed. We think, therefore,

that even under these California decisions, the matter of what was meant by "bonus" and "royalty" in a contract phrased as was the one now before the court, had not been judicially determined, as having the meaning ascribed to them by appellant.

We think it clear that there is a dictionary meaning of the word "bonus" that would fully support the plaintiffs' claim, i.e., "something extra".[3] Thus, but for some special meaning in the trade that would make it a word of art, when the contract provided a royalty of 8⅓% and then provided for one-half of any bonus payments, other than royalties it could well be argued that bonus meant anything extra (outside of anything strictly known as royalties) received by the lessor.

Holding as we do, however, that this particular contract leaves it open to either party to establish that the net income payments meet its claimed definition of royalty or bonus, we turn now to the nature of the proof on which the District Court made its finding of fact.

The precise fact findings by the trial court that support the decision in favor of plaintiffs are:

> 19. A "net profits interest" such as was provided in the 1952 lease of Universal Consolidated Oil Company was not a royalty "as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases" either by common usage, Court definitions or according to the intention of the parties when these contracts are made in 1943.

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[3]Something given in addition to what is usual or strictly due to the recipient. Webster's New International Dictionary, 1936 edition.

24. The "net profits interest" such as was provided in the 1952 lease to Universal Consolidated Oil Company was a "bonus" under these 1943 contracts.

It can hardly be argued that there was a lack of substantial evidence to support these findings. The evidence fully warranted, if, indeed, it did not demand, a finding that royalty as generally understood and defined is (1) an interest in, or measured by (2) gross production, (3) bearing no part of the cost of development, operation or production and (4) continuing from the first production until the last barrel is produced from the property, however these characteristics may be grouped or expressed. The outstanding characteristic, as testified to, seems to be that as every barrel of oil is taken out, the royalty is paid, whether or not the lessee makes a profit.

Thus, it was only logical for the Court to find that the payments here called "variable participating royalty" which are in fact payments representing one-half the *net* profits after the deduction of all operating and development costs, are not payments of royalties as generally understood and defined. They lacked the characteristic of being paid out of every barrel of production and they became due only after all expenses have been met.

In view of the fact that the only kind of payments dealt with in the contract were royalty, bonus and land rental payments, and that the latter two were stated to be distinguished from the other by what the industry understood were the qualities attributed to royalty, a strong argument could be made that all fruits from any leasing were intended

to fall within one of these three terms. This is what appellant contends. We need not go that far as a matter of law for us to approve the action of the trial court because its findings gave effect to this contention based on the evidence before it.

The provision in the contract referring the meaning of royalty to external evidence to determine whether the payment of net profits was distinguishable from royalty makes it necessary to refer to external evidence to ascertain the understanding and definition of the contrasted terms bonus and land rentals. Such external evidence clearly supports the finding that the variable participating royalties are bonus payments. The record includes evidence that there was a general custom and usage in the area at the time of the execution of the contract with respect to the meaning and use of the term "bonus" and that the meaning was that "bonus" comprehended every consideration that the lessor received other than royalties; Again, the term "bonus" meant "any consideration in addition to the normal or basic royalties that was paid for a lease."

Moreover, as we read the cases cited by appellant to demonstrate its contention that bonus cannot include these variable participating royalties, we find that they do not really support this claim, even though we should recognize them as controlling. Even in the case of *Geller* v. *Smith*, quoted above, there the definition relied on by appellant is "a sum of money paid by lessee to the lessor in consideration for the execution of a lease, *as distinguished from the return of royalty reserved by the lessor through the term of the lease.*" Once we have approved a finding that the net profits cannot be considered as "royalty", then there is

nothing in this definition that would exclude from the definition of "bonus" payments made by the lessee to the lessor as net profit in consideration for the execution of the lease. There is nothing in the language used by the court in *Geller* v. *Smith* that the "sum of money" must be either cash or must be exactly ascertained in amount at the time the lessee obligates itself to make the payments.

So, too, the definitions urged on the Court by appellant as stated in *Griffith* v. *Taylor*, 156 Tex. 1, 291 SW 2d 673. In that case, the Supreme Court of Texas quoted the above language of *Geller* v. *Smith* defining bonus and also quoted from *Texas Company* v. *Fontenot*, 200 La. 753, 8 So. 2d 689, stating, "bonus meaning the cash consideration paid or agreed to be paid for the execution of the lease." We do not understand that any of these cases stands for the proposition that the term bonus is not broad enough to comprehend payments made to a lessor, the amount and method of measurement of which payments are fixed by a formula, so long as the formula is not that which constitutes a royalty. We find nothing in the *Elsinore Oil Co.* v. *Signal Oil & Gas Co.*, 3 Cal. App. 2d 570, 40 P. 2d 523, case in conflict with what is said here.

We conclude, therefore, on the merits, that this contract is to be construed as entitling the plaintiffs, in addition to the 8⅓% payments to be received directly from the lessee, to receive a sum equal to one-half of the amounts received and to be received by Fox and denominated in the lease contract "variable participating royalties."

Several other matters remain for consideration. The first of these, appellant's contention that the plaintiffs did not have title to the claims sued upon because of a failure

to comply with the provisions of the California Blue Sky Laws on assignment of securities we think too insubstantial to require extended comment. Substantially all of the assignments here involved were made to their stockholders upon the legal dissolution of the corporations. As to the others, we think the trial court properly held that valid title to the claims resided in the plaintiffs.

The next point is the combined issue of parties and jurisdiction. Appellant strongly urges that the District Court for the Northern District of Texas did not have jurisdiction over the case for two reasons: (1) It was a suit involving an interest in real property and was thus not a transitory action and only the district court of the situs of the realty had jurisdiction, and (2) Fox Realty Company, a California corporation, as the lessor under the lease here being construed, was an indispensable party to the action by reason of its being a suit over an interest in realty, and if Fox Realty Company were brought into the suit as a defendant diversity jurisdiction would be destroyed because there were several California plaintiffs.

These two contentions are resolved by a single consideration. Fox Realty Company is *not* an indispensable party *because* the action is not one dealing with an interest in realty.[4] We need not consider whether, if Fox Realty were being sued, such suit would deal with an interest in realty by reason of the fact that Fox was the lessor and its reservation of a royalty interest (at least as to 11⅓%, and

[4]Appellant pitches its claim on indispensability on the theory that this suit adjudicates rights in real property. Appellees answer that no such real property interests are decided. Both seem to agree that if it were such a suit touching on real property Fox Realty would be an indispensable party

possibly also the 8⅓% payment) amounted to an interest in realty.[5]

Here the defendant was at no time in the chain of title to any of the interests included within the 1943 agreement under which its obligation arose to make the several kinds of payments. As between itself and the plaintiffs, Twentieth Century merely promised that the payments would be made. As we have already discussed, conveyance of the releases and of the fee to the third tract of land was made to Fox on the promise of Fox and Twentieth Century *jointly* and *severally* to pay the consideration. Twentieth Century's obligation thus was strictly a personal obligation, which by its agreement it repeatedly denominated *joint* and *several*. Of course, under a joint and several obligation the obligee can sue either or both obligors. The privilege of suing one without joining the other is a substantial benefit to the obligee which we think cannot be frustrated by holding that the other several obligor must be joined as an indispensable party.

Whatever might be the situation if Twentieth Century's obligation to pay these items to the plaintiffs arose from its having an assignment or conveyance from Fox as a

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[5]This proposition, the appellant states, is supported by Commissioner v. Southwestern Exploration Co., 350 U.S. 308 (although all the Court held there was that there was sufficient *economic* interest in the minerals in place in the owners of adjacent lands needed for drilling purposes to entitle them to take depreciation for federal tax purposes on proceeds from leases of drilling rights). Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788; Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P. 2d 351, 353; and County of Los Angeles v. Continental Corp., 113 Cal. App. 2d 207, 248 P. 2d 157.

Appellees counter principally by pointing to the language of the contract that is in terms of "amounts equivalent to, etc." and they cite In Re Broome's Estate, 166 Cal. App. 2d 488, 333 P. 2d 373.

predecessor of title, we do not here need to decide. Here Twentieth Century, so far as concerns any interest that Fox may have in real property, actually stands to one side and its liability to the plaintiff is to be construed solely on its contractual agreement to pay and not on any interrelationship between the parties flowing from a dealing with an interest in real property.

Next, we find no basis for holding that the finding by the trial court that there had been no waiver of rights claimed by the plaintiffs and no estoppel or ratification of them was not supported in the record. These matters are typically factual in nature and findings of fact by the trial court, of course, are not to be overturned unless clearly erroneous.

Finally, the appellant complains of the denial by the trial court of its motion to transfer the case to the Southern District of California for trial under the doctrine *forum non conveniens*, 28 U. S. C. A. § 1404(a). The trial court conducted a full hearing on this motion. Thus the law is as stated by this Court in *Pilot Life Ins. Co.* v. *Boone*, 5 Cir., 236 F. 2d 457, 461:

> "There is no indication that the District Court failed to give consideration to the convenience of the parties and the witnesses in the interest of justice, as required by the statute, and we cannot see that it abused its discretion in denying the motion for transfer."

The final judgment of the trial court was amply supported as to the construction of the contract touching on the one-half interest in the "variable participating royalty," as to jurisdiction of the court, the plaintiffs' title to the

claims, and absence of ratification. The Court did not err in refusing to transfer the suit for the convenience of the parties. The Court erred in holding that the plaintiffs were entitled to participate in the 3⅓% excess royalties.

For the correction of the judgment accordingly, the judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion. Costs of this appeal are charged two-thirds to appellees and one-third to appellant.

APPENDIX B

Opinion of the District Court on the Merits (September 4, 1959)

This suit involves the rights of the parties to participate in the proceeds of oil produced from certain valuable oil properties located within the limits of the City of Los Angeles, California.

The Fox Film Company of New York purchased valuable acreage in the City of Los Angeles, California, adjacent to Beverly Hills for the erection of a studio in the production of moving pictures to be sold and exhibited to the public. Oil had been discovered in certain portions of the city and in 1924 upon the passing of the title to the property in question it was expressly stipulated as follows:

"No oil or gas well shall at any time be drilled, bored or explored on said property or any part thereof"

the owners and operators of the studio feeling that such drilling would interfere with their work in the production of pictures as planned by the studio.

Very rich production of oil was found in Long Beach and other portions of Los Angeles and it became apparent that the studio property was in all probability oil-bearing and in considerable quantities. The oil properties became more and more promising and drilling concerns approached the owners with reference to the execution of a lease thereon. The parties were confronted with the stipulation in the deed of years before that no drilling for oil should take place upon the property. Before any drilling could take place it was necessary to get the restriction or limitation removed.

The property in question was made up of four tracts as will appear upon the attached map marked appendix "A". [page 32a of this Appendix].

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In order to have this restriction removed the Twentieth Century-Fox made a proposal to the Janss people and the Fox Hills Corporation and their successors in ownership seeking to effect a deal with them by which the restriction or limitation might be removed. The opening communication for the transaction was embraced in two identical letters to the Fox Hills Corporation and to Janss and contained the following paragraphs:

". . . we shall pay you, or cause to be paid to you, when and as received by us or by any of our subsidiaries:

"(a) an amount equivalent to 8⅓% of the proceeds of all gas, oil or other hydrocarbon substances extracted from wells bottomed on the property hereinbefore described.

"(b) 50% of any bonus payments or land rentals (as distinguished from oil or gas royalties as the term royalties is generally understood and defined in connection with oil and gas leases) made by any lessee and received by us or by any of our subsidiaries as consideration for making or entering into any lease for the extraction of oil, gas or other hydrocarbon substances from wells bottomed on the said property hereinbefore described."

the property being described being that shown on the map.

The above proposal was accepted by the former owners who held the restrictions and limitations on the title. A written contract of considerable length set out in great detail the rights of the parties involved but contained in effect the foregoing conditions and obligations of paying 8⅓% of the gas and oil proceeds and also 50% bonus that might be received from the lease or development of the property. The contract releasing the restriction placed the burden and responsibility upon the owner in fee in whose

favor the restrictions were relieved of leasing the property and paying over the 8⅓% of the royalty and 50% of the bonus. The owner of the land thus became the agent, or we might say more accurately trustee, of the title to the property which obligated him in making the lease to make an equitable transaction so as not only to secure for the plaintiffs herein the 8⅓% of the royalty, which had been previously agreed to, but also to so negotiate if possible as to secure a bonus in which the plaintiffs would own a 50% interest.

Acting under the authority contained in this contract removing the restrictions, the Fox Realty Company, the defendant herein, executed a lease to the Universal Consolidated Oil Company, which company proceeded to develop the property and is now developing it, a number of wells having been drilled and payments being made from the proceeds. The lease actually drawn provides that the lessee, Universal Consolidated Oil Company, will pay a royalty of 20% and then further provides:

"(b) 50% variable participating royalty to be determined, computed and paid in a manner hereinafter provided in Section B of this agreement, which said 50% is hereinafter, for convenience, designated and referred to as 'variable participating royalty.'"

The plaintiffs insist and contend that this "variable participating royalty" was and is in fact a bonus and given this different name from ordinary royalty in an effort to escape paying ½ of the bonus as called for in the contract.

The plaintiffs claim one-half interest in this variable royalty when and if paid and also an equal share in the gross royalty of 20% on which the lease was executed.

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At the time of the hearing of this controversy some discussion was had as to whether or not the terms of the agreement and of the several provisions of the agreement were free from ambiguity. The Court held that they were in no sense ambiguous, and as a help to the mind of the reader we now set forth the several provisions which will be in the nature of review of what we have just said.

By deed of date, May 15, 1924, duly recorded in the Deed Records of Los Angeles County we find the following restrictions:

"No oil or gas well shall at any time be drilled, bored or explored on said property or any part thereof."

Letter from the Twentieth Century-Fox Film Corporation to the Janss Investment Corporation dated February 3, 1943:

"Gentlemen:

"By deed of May 15, 1924 and recorded on August 12, 1924 at page 16 of Book 3508 of the Official Records of Los Angeles County Recorder, you conveyed to us (then known as the Fox Film Corporation) certain premises now occupied by us for studio purposes.

"One of the conditions, restrictions and reservations recited in said deed is:

" 'That no oil, or gas well, shall at any time be drilled, bored or explored on said property or any part thereof.' "

The writer proposes a modification of the contract and says:

"We agree that if we or any subsidiary that we control should at any time drill or permit others to drill wells bot-

tomed upon our said studio premises we shall pay you, or cause to be paid to you, when and as received by us or any of our subsidiaries:

"(a) An amount equivalent to 8-⅓% of the proceeds of all gas, oil or other hydrocarbon substances extracted from wells bottomed on the property hereinbefore described.

"(b) 50% of any bonus payments or land rentals (as distinguished from oil or gas royalties as the term royalties is generally understood and defined in connection with oil and gas leases) made by any lessee and received by us or by any of our subsidiaries as consideration for making or entering into any lease for the extraction of oil, gas or other hydrocarbon substance from wells bottomed on the said property hereinbefore described . . .

"If this offer is accepted by you, please indicate the same by signing your name and affixing your corporate seal under the words "Accepted" at the end of this offer, and when so signed, sealed and received by us, prior to the date above fixed, this letter shall constitute an agreement between us. . . .

(Signed) "TWENTIETH CENTURY-FOX
FILM CORPORATION,
"By (S.) WM. GOETZ,
Vice President.

"Attest:

(S.) GEO. WASSON,
Assistant Secretary.

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"Accepted:

"JANSS INVESTMENT CORPORATION,
"By (S.) EDWIN JANSS.

"Attest:

CHAS. D. HAYES,
Secretary.

An identical agreement was contained in a letter to the Fox Hills Realty Company and was accepted by them as of February 3, 1943.

Minutes of the Janss Investment Corportion of February 4 set forth the foregoing agreement and authorized its execution.

Thereafter a confirmatory agreement of the above correspondence and acceptances was entered into by the parties on the 15th day of April, 1943 in which was recited the original transaction in which the restriction against drilling was recited and then embodied in the agreement was the same one as contained in the letters giving the former owner 8⅓% of the royalty and 50% of the bonus. This agreement was duly signed and executed by both parties.

"JANSS INVESTMENT CORPORATION
"By (S.) EDWIN JANSS,
President,
"By (S.) CHAS. D. HAYES,
Secretary,
First Party.
TWENTIETH CENTURY-FOX FILM CORPORATION,

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By (S.) WM. GOETZ,
Vice President,
By (S.) GEO. WASSON,
Assistant Secretary.
FOX REALTY CORPORATION
OF CALIFORNIA,
By (S.) ALFRED WRIGHT,
Vice President,
By (S.) GEO. WASSON,
Assistant Secretary,
Second Parties."

Thereafter on the 21st day of March 1952 the Fox Realty Company executed a lease to the Universal Consolidated Oil Company, a corporation. The lease described the land as shown in the foregoing map. It contains the following paragraphs relative to the royalty provision:

"Excepting, Reserving and Retaining unto Fox, its successors and assigns:

"(a) 11⅔% of all oil, gas and other hydrocarbon substances produced and saved from wells bottomed under the above described lands payable at the times and in the manner hereinafter provided in Section A of this agreement, which said 11⅔% is hereinafter, for convenience, designated and referred to as the 'royalty share;' and

"(b) 50% variable participating royalty to be determined, computed and paid in the manner hereinafter provided in Section B of this agreement, which said 50% is hereinafter, for convenience, designated and referred to as the 'variable participating royalty.'

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(September 4, 1959)

"Section A. Royalty Share.

"1. Eleven and two-thirds percent (11⅔%) of all oil, gas and other hydrocarbon substances produced, saved, sold or removed from wells bottomed under the demised lands is defined to be the 'royalty share' as such term is used herein in determining the manner, time and methods of computing the share of all such oil, gas and other hydrocarbon substances to which Lessor and its successors and assign are entitled.

Then the letters provided that the lessee should pay 8⅓% royalty to the Janss and Fox Hills Company.

In describing the second provision in the lease that pertains to royalty it was expressly stated:

"Section B. Variable Participating Royalty.

"The variable participating royalty reserved to Lessor hereunder shall be determined, computed and paid as follows:

"1. After the exclusion of said royalty share (to wit, 11⅔% of all oil, gas and other hydrocarbon substances produced, saved, sold or removed from wells bottomed under the demised lands and any amounts of oil or gas used or lost by Lessee in its operations under this agreement, and after the further exclusion of the Janss share (less any portion thereof which may not be deductible therefrom by virtue of the provisions of the contracts described and set forth in paragraph 9 of Section A hereof but which would be deductible from Lessee's share under the provisions of this lease), all remaining oil, gas and other

hydrocarbon substances produced, saved, sold or removed by means of wells bottomed under the demised lands shall be called 'operating production.'

"2. The term 'lease account' as used herein shall be construed to mean the account in which Lessee enters all income and all chargeable expenditures for the computation of the variable participating royalty under this lease, and the term 'variable participating royalty,' as it is used in this agreement, is hereby defined to be Lessor's proportionate share (to-wit, 50%) of operating production remaining after the recovery by Lessee of the following chargeable expenditures hereunder . . ."

There being no ambiguity in the foregoing provisions which led up to the drilling contract, the question before the Court is does the defendant, charged as it was with the execution of the lease, made to the Universal Consolidated Oil Company, owe the plaintiffs any bonus or bonus money resulting from the foregoing transaction.

The terms "royalty" and "bonus" have been defined as follows:

A "royalty" has definite characteristics which distinquish it from "bonus" and "rentals." "Royalty" is always defined as a certain fraction or percentage of the minerals which are retained by the owner of the land, as distinguished from a fixed or definite amount of money. The "royalty" continues throughout the whole term of the lease or until the minerals are depleted or exhausted. It is a reservation by the owner of a share of the product or profit from the land.

"Bonus," on the other hand, is a sum of money, fixed in amount, paid by a lessee to the owner of land as con-

sideration for the execution of the lease, which lease entitles the lessee to explore the property in search of minerals. Said sum is normally paid in cash upon the execution of the lease but on some occasion may be deferred and may become payable out of designated funds, including proceeds from later drilling operations. The essential characteristic of a "bonus" is not the form of the payment but rather the certainty as to the amount of the obligation.

"Bonus" has frequently been defined in the many decisions throughout the country.

In the case of Griffith vs. Taylor by the Supreme Court of Texas, 291 S. W. 2d 673, a definition is given which we also adopt: "In its broadest sense 'bonus' is any consideration given for a lease over and above the usual 1/8 royalty, whether the additional consideration be paid or payable and whether paid in cash or payable out of production". Quoting Black's Law Dictionary and other authorities.

The same decision goes further and defines the term:

"When used in this sense 'bonus' would include a share of production reserved in a lease in excess of the usual 1/8th even if the excess share was to continue throughout the life of the lease."

As we have before stated, the defendant in executing this lease acted not only for itself but for those who had signed this contract authorizing it to make the lease. Thus the defendant, Twentieth Century-Fox Film Corporation, had undertaken and agreed to execute a lease on the property in good faith and to give to the plaintiffs a royalty of 8 1/3% of the production and in addition thereto to give the plaintiffs one-half of any bonus that might be received. Now if

the defendant had provided in the lease for a bonus and stipulated what the bonus consisted of, then there would have been no ground for this lawsuit. But the lease being free from ambiguity, in the light of the contract and the relation of the parties the defendant's obligation as trustee was apparent. If it could have procured a bonus, it was its duty to have done so.

The defendant was able to lease the land on a royalty of the gross production of 20% showing that it was a valuable oil property, since 1/8 or 1/6 was ordinarily provided for in undeveloped regions. That it was further able to secure a variable royalty out of the net production shows conclusively that the lease had value over and above the ordinary leasable territory and for which a bonus could have been easily and reasonably required.

When the defendant executed the lease for a 20% gross royalty and a 50% variable royalty it was providing for some money to be received by itself that could otherwise have been treated as a bonus.

Now when the trustee makes a transaction in which he and the beneficiary of his trust are both interested and the trustee is authorized to act for both parties he must exact for his beneficiary every benefit that he exacts for himself. The plaintiffs were not present when that lease was drawn and could only speak through the trustee whose duty it was to speak and act for them.

It is our opinion that the 50% "variable royalty" is a part of the bonus when and if produced which was covered by the contract between the parties.

Now we turn back to the 20% gross royalty. By previous contract and agreement 8⅓% belonged to the plaintiffs,

whereas the lease rights out of the gross production was 20%. This left 11⅔% for the trustee and only 8⅓% to the plaintiffs which they were already entitled to under the previous contract. It was the duty of the defendant in executing that lease, under the terms of the conditions under which it became trustee and under the conditions in which it was authorized to act, to procure a bonus, and in addition to the variable royalty give the other party 50% of the lease for 20% and not limit plaintiffs to that which already belonged to them. It is the view of the Court that that royalty on gross production of 20% should have been divided equally so that the plaintiffs in addition to their 8⅓% should have received enough of the 20% to have given them at least enough to give the parties share and share alike so that from the gross proceeds the plaintiffs and the defendant would have been entitled to a royalty of 10% each.

In this same connection our attention has just been called to the decision of the Court and valuable comments thereon by the Supreme Court of Oklahoma in the case of Sykes vs. Dillingham, 318 P. 2d 416, 417 from which we take the following:

"The litigation stems from a clause in a mineral deed whereby Dillingham conveyed his undivided ¼th mineral interest in 30 acres of land to Sykes. This mineral deed dated October 20, 1923, otherwise in the usual form, contained the following provision: 'It is agreed that the grantor shall have one-half of the bonus money derived from the sale of an oil and gas lease or extension of same on the above land.' The problem is to determine whether Dillingham is entitled to one-half of the 'bonus money' received by Sykes on a lease executed by him in 1952 and, if so,

whether the 'bonus money' would include a portion of the 'excess royalty' . . .

"The trial Court found generally in favor of the defendant, Dillingham, giving him one-half of the cash bonus paid by the oil and gas lessee to Sykes as well as one-half of the royalty reserved by Sykes in excess of 1/8th of the production. Plaintiff, Sykes, appeals.

"We conclude that defendant Dillingham is entitled to one-half of the cash bonus and we think it follows that he is entitled to ½ of the 'excess royalty.' "

In commenting upon this decision Professor E. O. Kuntz makes the following very pertinent observations:

"Where one party holds the executive right or exclusive leasing power and other parties hold the right to share in royalties or the right to share in bonuses, the holder of the leasing power should be required to exercise the utmost fair dealing in establishing the amount of the royalty and the amount of the bonus. See Morriss v. First National Bank of Mission, 1 O&GR 1371 (Tex. Civ. App. 1952), and discussion notes, 1 O&GR 1388; see also Jones, 'Non-Participating Royalty,' 26 Texas L. Rev. 569 (1948). In the Morriss case, while examining the problem of whether a shut-in royalty was royalty or rental, a Texas Court significantly said: '(We) think the issue of whether the lessor DID create a royalty is not so important nor grave as the matter of whether the lessor COULD create a royalty different from the usual one-eighth out of actual production.' 1 O&GR 1371, 1380 (Emphasis supplied.) Considering as being done that which ought to be done, to borrow an ancient equity maxim, the Court could reach the conclusion that the payment is bonus or royalty or rental, depending upon what utmost fair dealing would

have required as between the holder of the leasing power and the holder of the interest subject to such power . . ." 8 O&GR 312, 313.

It is the opinion and judgment of the Court that the plaintiffs would be entitled to 10% of the gross royalty. Thus an additional 1⅔% should be paid to them as a part of what was due them as a bonus and that the plaintiffs are further due as a part of their bonus 50% of the "variable royalty" mentioned in the lease contract as payable to the lessor.

We have heretofore ruled in pre-trial hearing that several parties owning a very minute interest in this controversy were brought into Court as involuntary plaintiffs, that is, their interest was identical with that of those who brought the suit, and although being small in quantity they were proper parties to the suit. Objection is made to their being called involuntary plaintiffs. Had they been brought in by process as defendant it would have appeared from the pleading that they were entitled to recover as the plaintiffs were entitled to recover and it would thus have been the duty of the Court to have aligned them on that side of the controversy and such being true we overrule the objection to their being called involuntary plaintiffs.

We have at various stages of these proceedings overruled defendants objection to jurisdiction, venue and other questions and points raised in this vigorously fought controversy, these are adhered without further enumerating here.

This law suit virtually crystallizes around two documents. "A", the contract of April 15, 1943, dealing with and providing for under conditions named a royalty and a bonus. "B", the lease of March 21, 1952. The second

paper manifestly seeks to avoid the obligations imposed by the first. Judgment is rendered for plaintiffs in accordance herewith.

In the trial of this case vast records of documents and depositions have been compiled and accumulated. These were largely dealing with the supposed ambiguity in the in the contracts, which issue we find is not in the case. We will, therefore, direct that each party bear his own cost. This we would assume could be done from moneys being paid as present royalties from the pipe line handling the oil under agreement between the parties

T. WHITFIELD DAVIDSON,
United States District Judge.

Tract # 7620
Subdivided into Homes and Apartments

RANCHO COUNTRY CLUB

PICO BLVD.

HILLCREST COUNTRY CLUB

99.34 Acres (Including Olympic Blvd.)
Deeded in 1928 by Janss Inv. Co. and Holmby Corp. to Fox Film (now 20th Century Fox Fil Corp.

Covered by April 15, 1943 contract of Janss Inv. Corp.

OLYMPIC BOULEVARD

0.79 Acres Deeded April 1936 by Fox Hills Realty Co. to Fox Realty Corp. called "Parcel No. 2" in April 15, 1943 contract.

96.83 Acres (including S 1/2 of Olympic Blvd.) Deeded Sept. 15, 1936 by Fox Hills Realty Co. to Fox-Pico Corp. - called "Parcel No. 1" in April 15, 1943 Contract.

89.349 Acres (including N. 1/2 of Olympic Blvd.) called "Parcel No. 3" in April 15, 1943 Contract.

SANTA MONICA BLVD.

North Roadway

South Roadway

Los Angeles Country Club

32a

HEATH AVE.

CITY OF BEVERLY HILLS

APPENDIX C

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

Gentlemen:

In this hearing we have before us a motion to dismiss. It is urgently pressed by defendant's counsel and resisted with equal vigor by plaintiffs' attorneys.

The forum in which the controversy would ultimately be litigated will depend upon the ruling in the motion. The issues to be fought out will be materially shaped by the ruling.

The plaintiffs bring this suit allegedly for the construction of a contract for an accounting and for a money judgment touching certain oil payments set forth in a contract between the parties and their predecessors growing out of an oil lease made in the City of Los Angeles, California.

The plaintiffs claim to be the former stockholders and successors in interest to more than 98 per cent of the former holdings and interest of the Fox Hills Realty Company, a California corporation, together with the interest of the Janss Investment Company in the same property. It is alleged that the defendant, the Twentieth Century-Fox Films of Delaware, is the successor to the former company of the same name, a New York corporation, which has been dissolved and that the second company is obligated to carry out the contracts of the former company and is subject to its obligations and contracts.

The contracts and documents out of which the controversy arises bear upon the oil interest and production

of 286.309 acres in Los Angeles, California. It was sold by the former owner who retained 89 acres and a fraction of the land and also put limitations and drilling prohibitions and restrictions upon development of oil under the land that was sold and delivered. Later the defendant herein purchased the 89 acres for a large consideration and contemporaneously with the purchase contracted and stipulated with the former owners and grantors that the former owners would waive or relinquish the limitations that had been placed on the right of drilling for oil. And in connection with the waiver or release of this limitation those acquiring the land entered into certain stipulations and contractual obligations set forth as A and B in such contract of waiver of the former restriction.

In the offer as accepted February 3, 1943, Section A provided that those releasing and waiving the oil limitations with reference to drilling the land would thereafter receive 8⅓ per cent of the proceeds of all gas, oil or like substances extracted from the lease bottomed on the property described.

Section B provided that they would receive 50 per cent of any bonus payment or land rentals as distinguished from oil or gas royalties generally understood and defined in connection with oil and gas leases. The word 'bonus' being ordinarily accepted as the term describing the price paid in cash for the lease in addition to any royalties that might be retained.

Such provisions appear in the April contracts in paragraph 2 et seq of the Janss contract and paragraph 6 et seq of the Fox Hills contract.

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

In proven fields or property adjacent to proven fields such bonus is sometimes large.

The plaintiffs insist and allege that the defendant has sought in devious ways to escape the payment of this bonus by accepting money under other provisions and titles which in fact was a bonus. An accounting is called for in said matter and a construction of the terms and provisions for the contract.

Defendant moves to dismiss the suit on three principal grounds:

1. That the action involves title to real property located in California over which the Texas Federal Court has no jurisdiction.

2. That the Fox Realty Corporation of California, as lessor in the 1952 lease, is an indispensable party to the action and that since its being an indispensable party it must be brought into Court and when brought in there will not remain any diversity of citizenship and the suit will have to be dismissed for the want of jurisdiction.

3. That the suit is not between citizens of different states, particularly with reference to certain parties designated as involuntary plaintiffs and that the involuntary plaintiffs should be brought into Court and when brought in their presence would also destroy the jurisdiction of the Court for the want of diversity.

To each of these propositions the plaintiffs have replied urging numerous authorities as sustaining their position.

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Under the first point urged the Court must decide if the declaration in the complaint calls for an adjudication of the title of real property. If it does, then the defendant's motion to dismiss should we think be sustained.

The complaint calls for a declaratory judgment and does not deal with the title to land in any portion but seeks a money payment and that the payment is to be from the proceeds of oil realized under the terms and provisions of certain written instruments.

We do not think it is necessary to adjudicate the title to land in order to determine the disposition of a sum of money which was realized from the sale of oil that came from the land. It involves of course the elementary subject of severance. Timber standing and growing on land is a part of the realty. After it is cut and removed and perhaps converted into lumber it is not a part of the realty but is personalty. Oil situated in the ground covered by an oil lease is a part of the realty until it is produced. After it is produced and put into a pipeline and removed from the premises it is no longer a part of the realty.

We think it reasonably clear that the title to the land is not involved in the controversy and will therefore overrule point one in the motion to dismiss.

The Indispensable Party. The Fox Realty Company of California is not a party to the suit. It is the lessor of the lease.

"An 'indispensable party' is one whose interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that his legal

District Court's Letter Opinion Denying Petitioner's Motion to Dismiss (June 12, 1958)

presence as a party to the proceeding is an absolute necessity without which Court cannot proceed." Rule 19, Note 4 of the Federal Rules of Civil Procedure, Title 28 U. S. C. A. page 38.

If the California lessor were a party to the suit then there would be no diversity of citizenship and the defendant's motion would automatically prevail. But as we have held under point one, since the land is not in controversy neither is the oil not yet produced in controversy.

The thing in controversy is a written document and money produced under the provisions of such document. It can neither take from nor add to the holdings of the alleged indispensable party as his rights are vested and the suit does not seek to deprive him of any of such rights, nor could any judgment be rendered under the pleading that would affect such rights. If a contractual obligation creates property, rights or privileges which inure to the benefit of parties, they have a right to litigate over them.

If the suit does not affect the title to the realty, then we further conclude that the California company is not an indispensable party to the controversy.

We now come to the third point and that of the involuntary plaintiffs. Certain parties reside in the State of New Jersey who own small interests in common with the plaintiffs, their interest amounting to less than 2 per cent. These claims being small and the owners for reasons of their own having not entered into the controversy they are neither plaintiffs nor defendants in the suit. The plaintiffs notify them of the controversy and set them forth as pro-

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vided in Rule 19 as involuntary plaintiffs. The law recognizes the status of the holder of a certain interest in a controversy whereby under a given state of facts he may be designated as an involuntary plaintiff. Through the years it has again and again devolved upon the Court to align the parties. At times the interest of a given defendant would be in common with those of the plaintiff and it would be necessary under such circumstances to align such person with those who held similar interest.

Allowing that the suit proceeds, what may be done with the interest of these persons described as involuntary plaintiffs? The Court could not arbitrarily take their interest and give it to the defendant and neither could the Court take it and divide it among the plaintiffs. The right must simply be recognized and set aside. And if their interest is contingent upon the claim of the plaintiffs and their right of recovery, if any, is identical with plaintiffs' then we think an appropriate title for them would be that described as involuntary plaintiffs.

Rule 19 expressly provides that persons having a joint interest shall be made parties and be joined on the same side as the plaintiff or the defendant. And when a person should join as a plaintiff refuses to do so he may be made a defendant or in proper cases an involuntary plaintiff.

We believe the case must be heard upon the merits. The motion to dismiss is denied.

Sincerely yours,

T. WHITFIELD DAVIDSON.

APPENDIX D

District Court's Opinion Denying Petitioner's Motion to Transfer (August 5, 1958)

OPINION OF THE COURT.

(T. Whitfield Davidson, United States District Judge)

When a Court has a case presented by good lawyers he can listen even overtime. When the Court hears good lawyers present their respective sides with zeal the Court possibly sometimes wishes he could reward both attorneys; but that is not his job. His job is not to try the lawyers, but to resolve the question.

Way back in this matter the Fox people were in New York. One of their branches is now making a motion to transfer this case from Dallas, Texas to California. The Fox people bedded out from New York. In California they had organizations, one succeeding another, and transactions of different form. As a result, they have claimants in this controversy in New York and in California, and a lawsuit in Texas.

One of the elements that enter into a removal or transfer of a civil case is, of course, the right of the plaintiff to select his forum. That is, if there be two Courts, either of which has jurisdiction of the controversy, then he may select which Court he will use. Then the other party, if he feels aggrieved and that he has been discommoded and that he will be handicapped in the production of the testimony and otherwise injured, he may make a motion to remove the case, to transfer it to another Court where there would be more convenience to the plaintiff and the defendant.

District Court's Opinion Denying Petitioner's Motion to Transfer
(August 5, 1958)

In this suit, as a matter of choice, the plaintiff might have brought his suit in New York. It might be easily understood that oil terminology and oil litigation would not be so well grasped and understood in New York as it would be in Texas or California. Then he had a choice between Texas or California.

Texas has been, more or less, in volume, a pioneer in the oil business in the United States. Pennsylvania was first, but in volume, Texas was, you might say, the pioneer. Therefore, it is not to be wondered that the decisions in California frequently cite decisions from Texas.

Now, the evidence is that the plaintiff, in selecting a forum, looked over the probabilities of getting a trial, and he went thoroughly into it from the report of the Administrative Office in Washington, and by going on the ground in both California and in Texas. And he came to the conclusion that he could get a trial much sooner in Texas than he would be able to get one in California. He brought his suit in Texas.

Then the defendant, through its counsel, Mr. Walker of California, filed an affidavit in which he seeks to remove the case to California.

Mr. Walker's affidavit, viewed in the light of the entire record, was a statement of facts, or a resume of the testimony that he hoped to produce. But it appears that he didn't know that he could produce it. Seemingly he had only conferred with one of the witnesses. It appears that some two or three other witnesses had been interviewed by a firm of attorneys other than Mr. Walker. From the questions that these attorneys asked these prospective witness it is mani-

fest that those attorneys were not equipped, they were not prepared, they were not informed very fully as to the nature of the controversy, and that they didn't ask the witnesses what particularly they knew; such questions as would be "were you at a certain place at a certain time?". That leases, stating it most liberally, the affidavit of Mr. Walker very badly crippled and we do not consider it sufficient, in the light of the test of cases, to justify a removal, in the light of all the other circumstances of the case.

Now much has been said about producing the witnessses in person rather than by deposition. In a tort case, like a criminal case, the attitude of the witness, his interest and bias can be so readily seen by the Court or Jury. In a contract case it is not so readily apparent, and it does not so often occur.

It impresses the Court in this case, in visioning the matter of the probable trial on the merits, that this case is going to turn, very largely, upon documentary evidence. Much evidence is sometimes offered in cases, but when the last and final summary of the matter comes around, it has to turn upon a written document. The written documents in this case and the conduct of the parties toward it will be the most important part of the trial. And the witnesses will be manifestly from the wide business experience they have, and they are a different type of witness than appears in these tort cases. They will be witnesses who understand the import of their testimony, and who have a fair knowledge of Court procedure. And in depositions they can make themselves, ordinarily, just as clear as they can by oral testimony. In many matters, such as contracts, wills, deeds

District Court's Opinion Denying Petitioner's Motion to Transfer
(August 5, 1958)

and contracts of this type the written testimony of witnesses is just as desirable as his sworn testimony in person. And then, finally, he escapes, if he is biased in any way, he escapes that cross examination that sometimes exterminates [illegible].

Viewing Mr. Walker' affidavit and the testimony affecting it, and considering the fact that the case can be produced and developed by deposition, we feel the evidence doesn't require a change or transfer from Texas to California.

We have plenty of work of our own, and we wouldn't object to those Judges over there taking it, but we can't take that into consideration.

An order will be entered denying the motion.

APPENDIX E

Judgment

Extract from the Minutes of January 23, 1961

TWENTIETH CENTURY-FOX FILM CORPORATION

No. 18,245

versus

PAUL C. TEAS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Paul C. Teas, and others, be condemned, in solido, to pay two-thirds of the costs in this Court; and that the appellant, Twentieth Century-Fox Film Corporation, be condemned to pay one-third of the costs, for all of which execution may be issued out of the said District Court.

* * * * *

APPENDIX F

Order Denying Rehearing

Extract from the Minutes of February 21, 1961

TWENTIETH CENTURY-FOX FILM CORPORATION

No. 18,245

versus

PAUL C. TEAS, ET AL.

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

* * * * *